

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

WESTROCK SERVICES, INC.)	
)	
and)	
)	
JOE PIKE, Petitioner)	CASE 10-RD-195447
)	
and)	
)	
GRAPHIC COMMUNICATIONS)	
CONFERENCE/INTERNATIONAL)	
BROTHERHOOD OF TEAMSTERS)	
SOUTHEAST LOCAL 197-M)	

MOTION TO REPLY TO OPPOSITION TO REQUEST FOR REVIEW

Petitioner Joe Pike and his employer WestRock seek leave to reply to the GCC's July 18, 2017 Opposition to Request for Review on grounds the GCC's response (1) misrepresents WestRock's request; (2) mistakenly contends the NLRA gives the Acting Regional Director ("ARD") authority to dismiss a petition as "tainted" by ULPs whenever there are factual allegations sufficient for a ULP Complaint to issue; (3) repeats the ARD's false assertion that his determination rested on "testimony" given at a "hearing" never held; and (4) effectively deprives Petitioner Pike and other unit employees of NLRA §§7 and 9 rights by affording no means of restoring their right to a vote on Petitioner's RD petition if the Board later determines that the ULPs did not occur:

1. The issue is not whether (as the GCC contends) the ARD can dismiss a petition based on undisputed facts establishing ULPs "tainting" the petition, but whether (as Pike and WestRock contend) when there is conflicting ULP evidence, the ARD can dismiss the petition without a hearing on whether such ULPs in fact occurred.¹

¹ Before final dismissal, the factual issues surrounding the ULP charges should have been

a. The GCC Opp. p. 2 claims that NLRB rules "clearly contemplate dismissal of a petition for an election by a Regional Director on account of unresolved charges."

(1) In fact, neither 29 C.F.R. §102.71(a) nor any other regulation confers jurisdiction on the Regional Director to decide disputed facts respecting the employer's guilt of ULPs that could taint a petition.

(2) Instead, NLRA §10(b) confers that jurisdiction on the Board.

b. Contrary to the GCC's Opposition, the law is clear that, even when the ARD feels unproven alleged ULPs might conceivably taint a petition, resolution of disputed facts regarding the existence of the alleged ULPs requires a hearing and resolution by an ALJ, **not** just the ARD's preliminary finding that a Complaint and Notice of Hearing should issue:

GCC Position

"The Rules of the National Labor Relations Board clearly contemplate dismissal of a petition for an election by a Regional Director on account of unresolved charges of unfair labor practices."

* * *

"Thus, so long as the ARD found merit to the unfair labor practice charges brought by the Union and that those charges challenge the circumstances surrounding the decertification petition and that those charges, if proven, directly affect the petition, the Regional Director was authorized by Board law to dismiss petitioners petition and that decision was neither arbitrary nor capricious."

GCC Opp. pp. 2, 4

The Law

"[W]e conclude that, absence a finding of a violation of the Act, or an admission by the employer of such a violation, there is no basis for dismissing a petition based on ... alleged but unproven unfair labor practices. To do so would unfairly give determinative weight to allegations of unlawful conduct and be in derogation of employee rights under Section of the Act."

Truserv Corp., 349 NLRB 227, 228 (2007).

c. Contrary to the pronouncements at GCC Opp. pp. 3-5, **no case the GCC**

resolved, along with the "causal relationship" between the alleged (and disputed) ULPs and the RD petition. See Saint Gobain Abrasives, Inc., 342 NLRB 434, 434 (2004).

cites vests a Regional Director with jurisdiction to decide disputed facts that determine whether ULPs that might taint a petition have, in fact, occurred.²

d. GCC Opp. p.9 overreaches in claiming the ARD could dismiss if he found the petition was "instigated by the employer."

(1) The Truserv case the GCC quotes involved dismissal due to a ULP settlement, not (as here) based on taint from ULPs still being litigated.

(2) As Truserv concluded that the absence of a finding or admission of ULPs foreclosed dismissal of the petition, the law cannot allow dismissal based on an alleged taint by ULP charges if the Board, after hearing, finds the ULPs did not occur. See 349 NLRB at 228, 231-32.

(3) Truserv means, at a minimum, that:

(a) absent an admission, the Board's determination concerning whether ULPs occurred binds the Regional Director, and

(b) the Regional Director is not free to rely on disputed and unproven allegations of ULPs as a basis for finding that ULPs occurred.

2. Contrary to the GCC's Opp. pp. 5-6's misrepresentation that there was a hearing with testifying "witnesses," it is undisputed that no such hearing was held as 29 U.S.C. §160(b) requires.

² As shown in the GCC's Opp. pp. 7-8 discussion of the severity of ULPs, the GCC, contrary to Truserv, is "unfairly give determinative weight to allegations" by acting as if the ULPs it alleges had undisputedly occurred. By contrast, by the time the Board (not the Region) issued its reported decisions in Linwood, the ULP charges had already proceeded to hearing and the ALJ had found, in a decision adopted by the Board, that the employer's agents had, in fact, "solicited Mary Jo Halpin, Cassandra Mortona, and Henry Waugh to sign a decertification petition" Linwood Care Ctr., 365 NLRB No. 8, slip op. at 1 (Jan. 23, 2017) (the RM case); accord Linwood Care, 365 NLRB No. 24, slip op. at 1 (the RD case). Here, as in Truserv "the employer conduct in question is only alleged to be unlawful, and thus there is no basis on which to dismiss the petition." Truserv, 349 NLRB at 227.

a. The ARD has issued no Complaint and Notice of Hearing—let alone held one.³

b. The record contains no transcript—at most, it contains conflicting statements of witnesses who have not been subject to cross-examination.⁴

3. The consequence of ignoring the law and "finding" of WestRock's guilt of disputed ULPs without a hearing is not only arbitrary, it tramples employee rights to serve GCC interests.

a. Here, the ARD should have acknowledged the **possibility** that the forum with jurisdiction to decide would find **no ULPs** relevant to the petition; the contract-bar doctrine means that the ARD's usurpation of ULP jurisdiction and his resulting dismissal of the petition will effectively bar **employees** from voting **for years**.⁵

b. While the proposed outcome does GCC bidding, it loses sight of the NLRA mandate that §7 protects **employee** rights—not employer rights and not union rights.

c. Contrary to GCC Opp. p. 8, requiring a hearing to resolve fact disputes concerning ULPs is statutory and constitutional, not just an agency preference: "Without a finding of liability or an admission of wrongdoing, there is no substantial evidence that the employer engaged in the alleged unfair labor practices.... To assume otherwise is inconsistent

³ The GCC's claim that the ARD has not issued a Complaint yet because WestRock disputed the hearing date is false. The parties have agreed on a hearing date before the sole entity that has the jurisdiction the ARD lacks.

⁴ The GCC does not disclose who has provided statements. All the statements WestRock has seen (i.e., the statement of its managers and supervisors) which support WestRock's denial of the subject ULP's.

⁵ The GCC's Opp. p. 4 case of Renaissance Hotel Operating Co., Cases 28-RD-112742 & 113966, 2014 WL 1494695, at *1 (NLRB Apr. 16, 2014), said that "petitions are subject to reinstatement, if appropriate, after final disposition of the unfair labor practice proceedings." The ARD here provided Petitioner Pike and his co-workers no similar express protection.

with fundamental due process." See Truserv, 349 NLRB at 231-32; see Saint Gobain, 342 NLRB at 434 ("genuine factual issues require a hearing.").

d. Otherwise, Regional Directors would, for all practical purposes, have unfettered jurisdiction to decide disputed ULP facts anytime a petition was pending and no subsequent ALJ hearing would ever be necessary, the statute, with good reason, recognizes that Regional Directors are not equipped for that.⁶

e. The ARD could have protected employee NLRA §§7 and 9 rights either by staying proceedings on the petition or by dismissing it subject to reinstatement if the Board determined that the ULPs he found to taint the petition did not in fact occur;⁷ by doing neither, the ARD arbitrarily relinquishes protection of Petitioner Pike's (and other unit employees') right to cast a timely vote, instead favoring the ongoing financial interest of the GCC.⁸

WHEREFORE, Petitioner Pike and employer WestRock respectfully request that the Board consider this Reply to the GCC's Opposition and grant review of the ARD's decision dismissing the RD petition without providing any express leave for reinstatement.

⁶ According to GCC Opp. 5, the ARD could have dismissed the petition based on the GCC's allegation WestRock manager Randy Reed "collect[ed] decertification cards from employees" on or about "March 27, 2017." Not only does Reed dispute this unproven allegation; if true it would not be able to taint this petition, which Petitioner Pike already had submitted three days previously, on March 24, 2017. While the claim of post-petition conduct could support a blocking charge, see CHM §11730.1, it cannot taint a petition already filed. Letting those with jurisdiction conduct hearings before resolving disputed facts avoids such absurd results.

⁷ See supra note 5. Dismissal subject to reinstatement would not be subject to the contract bar that face unit employees thanks to the ARD's capricious refusal to include this express proviso. E.g., City Markets, 273 NLRB 469, 470 n. 2 (1984).

⁸ The GC Opp. p.4 n.1 discussion of the arbitrary-and-capricious standard in Elklund Bros., 136 NLRB 471, 476 (1962), is inapposite because that case did not address resolution of disputed facts concerning ULPs.

/s/ Thomas W. Scroggins

Thomas W. Scroggins
ATTORNEY FOR PETITIONER
JOE PIKE

OF COUNSEL:

ROSEN HARWOOD
P.O. Box 2727
Tuscaloosa, Alabama 35403
Telephone: (205) 344-5000
Facsimile: (205) 758-8358
E-mail: tscroggins@rosenharwood.com

/s/ John J. Coleman, III

John J. Coleman, III
Marcel L. Debruge
Frank McRight
ATTORNEYS FOR EMPLOYER
WESTROCK SERVICES, INC.

OF COUNSEL:

BURR & FORMAN LLP
420 North 20th Street, Suite 3400
Birmingham, Alabama 35203
Telephone: (205) 251-3000
Facsimile: (205) 458-5100
E-mail: mdebruge@burr.com
jcoleman@burr.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed with the Office of the Executive Secretary of the Board via Electronic Filing, a copy has also been served via email on the following, on this the 20th day of July, 2017:

Terry D. Combs
Acting Regional Director
National Labor Relations Board
Region 10
233 Peachtree St., NE
Harris Tower Ste. 1000
Atlanta, GA 30303-1504
Terry.combs@nlrb.gov

Peter J. Leff, Attorney
Mooney, Green, Saindon, Murphy
& Welch, P.C.
1920 L Street NW, Suite 400
Washington, DC 20036-5041
pleff@mooneygreen.com

/s/ John J. Coleman, III
OF COUNSEL